Meisner Electric, Inc. of Florida *and* International Brotherhood of Electrical Workers, Local Union #756, AFL–CIO. Cases 12–CA–15411, 12–CA–15478, and 12–CA–15603

February 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The principal issues presented in this case[1] are whether the judge correctly found that the Respondent: violated Section 8(a)(1) of the Act by making several threats about employees' union activities and by telling employees that they could report other employees' union solicitation activities to management; and violated Section 8(a)(3) and (1) by reprimanding and discharging employees because of their union activities. The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

Contrary to the Respondent and our dissenting colleague, we find no procedural error in the judge's finding that the Respondent's general foreman, Bowman, violated Section 8(a)(1) of the Act by implying in a speech to employees that they can report fellow employees' union solicitation activities to management, even though no employee had previously complained about such activities. Although not specifically alleged in the amended complaint, the unfair labor practice issue presented by Bowman's statement is closely connected to the subject matter of the complaint (which did specifically allege other unlawful statements by Bowman in the same speech) and has been fully litigated. Indeed, Bowman raised the issue and admitted making the statement while testifying on direct examination by the Respondent's counsel.

Our dissenting colleague misstates Board law in contending that the General Counsel had an affirmative obligation, upon hearing Bowman's admission, to move to amend the complaint if he wanted to challenge the legality of Bowman's statement. Contrary to the dissent,

> It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses.[4]

Based on the foregoing, we affirm the judge's finding that Bowman's statement violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Meisner Electric, Inc. of Florida, Delray Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER COHEN, dissenting in part.

The judge found, and my colleagues agree, that the Respondent violated Section 8(a)(1) when its general foreman told an employee that the human resources director said that union advocates could not harass employees and, if they did, employees could complain to the general foreman. The majority adopts the judge's finding that this statement unlawfully implied to employees that ''they can report to management that other employees are soliciting them to join the Union, where solicited employees have not complained of such.''

I do not reach the substantive issue. Because this conduct was neither alleged in the complaint nor fully litigated at the hearing, I do not agree with my colleagues.

The complaint, as twice amended, alleged numerous incidents of Section 8(a)(1) conduct by the Respondent. The complaint did not allege the conduct discussed above. The judge and my colleagues find that this conduct was closely related to the conduct that was alleged in the complaint. I do not pass on this issue. Questions concerning the relationship of allega-

[1] On September 9, 1994, Administrative Law Judge Howard I. Grossman issued the attached decision. The Employer filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no merit in the Respondent's allegations that the judge's resolutions of credibility, findings of fact, and conclusions of law are the result of his bias and prejudice. There is no basis for finding that bias or prejudice exists merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

[3] In affirming the judge's conclusion that Terry Harrison was the Respondent's agent, we do not rely on the judge's discussion of precedent in fn. 15 of his decision. We also give no weight to the Respondent's failure to interview employee Bostwick in concluding that the Respondent violated Sec. 8(a)(3) by discharging employee Ching.

[4] *Pergament United Sales*, 296 NLRB 333, 334 (1989) (fns. omitted), enfd. 920 F.2d 130 (2d Cir. 1990); see also *Williams Pipeline Co.*, 315 NLRB 630 fn. 3 (1994), where the Board specifically disavowed comments by the judge which parallel the reasoning of our dissenting colleague in this case.

tions arise when the General Counsel seeks to amend a complaint; the issue in such cases is whether the new allegation is closely related to the allegations of the charge.[1] The issue in this case arises because the General Counsel *did not seek to amend the complaint.*

When the additional statement by the general foreman came out in testimony, the General Counsel was obligated to promptly amend the complaint if he sought to challenge this statement under Section 8(a)(1). A simple motion to amend would have sufficed. The General Counsel failed to take this simple step. Instead he waited until his posthearing brief to argue for this additional unalleged violation.[2] Thus, the Respondent was not given fair notice, at hearing, that it should offer a defense.

My colleagues rely on *Williams Pipeline Co.*, 315 NLRB No. 86 (Nov. 23, 1994), and *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F. 2d 130 (2d Cir. 1990). I respectfully disagree with these cases insofar as they would support the finding of the 8(a)(1) violation involved herein. In my view, elemental due process requires that a respondent receive timely notice of an allegation that it has violated the Act. Upon receiving such notice, Respondent can defend against the allegation. The fact that a respondent has received timely notice of a closely related allegation will not suffice. Respondent is entitled to defend against each and every allegation, whether they be closely related or not.[3]

I recognize that the unalleged violation is based on testimony from the Respondent's witness. However, I do not agree with the judge or my colleagues that this cures the defect. Had the Respondent known that it was accused of violating the Act in this additional respect, it could have pursued the issue, for example, by offering contextual evidence to explain the statement. Whether the Respondent ultimately would have succeeded is not determinative. The critical inquiry is whether Respondent was afforded an adequate opportunity to fully litigate an allegation that it violated the Act. I find that it was not offered that opportunity.

Based on the above, I would not find this unalleged 8(a)(1) violation. In all other respects, however, I agree with my colleagues.

[1] See *Redd-I*, 290 NLRB 1115 (1988).

[2] The Respondent promptly opposed the General Counsel's attempt to have the unalleged statement found unlawful by moving to strike this portion of the General Counsel's posthearing brief.

[3] In any event, *Pergament* is distinguishable. In that case, the complaint alleged that a refusal to hire was unlawful under Sec. 8(a)(3). The Board found a violation of Sec. 8(a)(4). As the enforcing court pointed out, respondent knew of the precise conduct that was under attack (refusal to hire) and that its motive was a key element of the case. Those facts are not present here. Respondent did not know of the precise conduct under attack, and motive is irrelevant.

E. Walter Bowman III, Esq., for the General Counsel.
Mark E. Levitt, Esq. (Hogg, Allen, Norton & Blue), of Tampa, Florida, for the Respondent.
Stephen R. Williams, president for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. Following various charges filed by the International Brotherhood of Electrical Workers, Local Union #756, AFL–CIO (the Union), and the issuance of three prior complaints[1] the Union filed a charge in Case 12–CA–15603 on July 27, and a second consolidated complaint issued on July 27. As amended at the hearing,[2] it alleges that Meisner Electric, Inc. of Florida (Respondent or the Company) threatened its employees with unspecified reprisals if they wore union insignia, with unspecified reprisals or discharge if they engaged in union activities, and loss of jobs, surveillance, and more onerous working conditions if they engaged in union activities or selected the Union as their representative. These are alleged to be violative of Section 8(a)(1) of the National Labor Relations Act (the Act).

Further, the complaint alleges that Respondent issued a disciplinary reprimand to employee Randall Morgan, two reprimands to employee James Spivey, and discharged the latter and employee Stephen Ching because of their union activities—all in violation of Section 8(a)(3) and (1) of the Act.

A hearing on these matters was held before me at Patrick Air Force Base, Florida, on May 23 through May 25, 1994. Thereafter, Respondent and the General Counsel filed briefs. Respondent then filed a motion to strike a portion of the General Counsel's brief, and the latter filed a response. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Florida corporation with an office and place of business in Delray Beach, Florida, where it is engaged in the business of electrical contracting in the construction industry. The events of this litigation involved work at the Kennedy Space Center. During the 12 months preceding issuance of the complaint, Respondent purchased and received goods valued in excess of $50,000 directly from points located outside the State of Florida, and derived gross revenues in excess of $500,000 from work performed for agencies of the United States Government. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] In Case 12–CA–15411, an original and an amended charge were filed on February 3, 1993, and March 15, 1993, respectively, and complaint issued on March 18, 1993. Unless otherwise stated, all dates are in 1993. In Case 12–CA–15478, an original and an amended charge were filed on March 16 and April 28, respectively, and a consolidated complaint issued.

[2] Sec. 5 of the complaint was withdrawn by the General Counsel.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Union Campaign*

The most active union proponent was alleged discriminatee Stephen Ching, a longstanding union member and a former assistant business agent. His intention was to organize the Respondent's employees. The Company hired him in July 1992, and Ching started soliciting union membership in about September or October of that year. Alleged discriminatee Randall Morgan, and Ronald Burk, both union members, were hired in the fall of 1992.

About three union meetings were held in January. On January 15, Union President Stephen Williams sent a letter to Company President Tim D. Onnen, advising him of the organizational activity, and the fact that Ching, Morgan, and Burk were on the organizing committee.[3] On January 20, Williams sent Onnen a letter claiming that the Union represented a majority of his employees on the basis of authorization cards, and demanded bargaining.[4] On January 25, the Union filed a petition for a Board election.[5]

A union meeting was held on the evening of June 20. Kenneth Bowman, the Company's general foreman,[6] testified that he heard about this meeting, that it was common knowledge, and that there was a lot of talk about it. The complaint alleges that the unfair labor practices began on the date of the meeting. The Company posted a notice that there would be a mandatory meeting of all production employees at 2 p.m. on January 21.[7]

B. *Alleged Threats by Terry Harrison—Harrison's Status*

1. Harrison's statements

James Spivey, an alleged discriminatee, testified that alleged Company Agent Terry Harrison, on the morning of January 20, told another employee in Spivey's presence that any employee attending the union meeting that evening would be fired. Harrison returned a short time later, and told the same employee and another that the Company was going to have a video camera in the parking lot of the Holiday Inn where the union meeting was scheduled to be held, and that anybody showing up on the videotape would be terminated.

Spivey further averred that, early the next day, January 21, Harrison told the same employees that he had to ''keep an eye on them because the Union boys were running their mouths.'' A short time later, Harrison said to Spivey: ''I've got to keep a close eye on you guys now that all this shit's out.''

Spivey's testimony is uncontradicted. In fact, Harrison admitted that he made statements to employees on January 21 about (1) the Company's videotaping a union meeting, (2) the Company's pushing harder because of the Union, (3) the likelihood of layoffs because of the Union, and (4) a warning that the employees should not be ''hanging around'' because the Union was ''going to cause them problems.'' Harrison asserted that he made these statements during the lunch hour, that he was ''just joking,'' and that everybody laughed.

General Foreman Bowman denied telling Harrison to make these statements, and denied advance knowledge that Harrison was going to do so. However, he admitted hearing about them ''later,'' at a time which he could not recall. Bowman further agreed that he did not tell Harrison that he should not be making such statements. There is no evidence that Bowman repudiated or disavowed these statements, and I conclude that he did not do so.

I credit the uncontraverted evidence of Harrison's statements. I do not credit his averment that he was ''joking.'' He does not even assert this with respect to the statements made in Spivey's presence. Even if Harrison's ''joking'' version is accepted, pertaining to a lunch period, the unlawful effect of a coercive statement is not blunted merely because it is ''accompanied by laughter or made in an offhand humorous way.'' *Ethyl Corp.*, 231 NLRB 431, 434 (1977).

2. Evidence of Harrison's status

The complaint alleges that Harrison was an ''agent'' of the Company. There is no allegation that he was a ''supervisor.'' However, the evidence relates to both supervisory and agency issues.

The building where the employees were working was very large, three floors each about 400 feet long and 50 feet wide. Each floor had an individual characterized by the Company as a ''leadman,'' and by the General Counsel's witnesses as a ''foreman.'' The total number of employees working in the building ranged from 40 to 60.

The Company's witnesses affirmed that Harrison met with General Foreman Bowman and Superintendent John Coyle every morning, that they told him what work needed to be accomplished that day, and which employees were to perform a particular job. Harrison worked with about 8 other employees on the first floor. Although he declined calling them his ''crew,'' he did tell them what work had to be performed and responded to requests for assistance from them. Randall Morgan testified that Harrison reassigned employees from one job to another once or twice a day. Superintendent Coyle or General Foreman Bowman did this only once or twice a year.

Harrison testified that he attended weekly meetings with Superintendent John Coyle, General Foreman Bowman, Dave Kenny, and Ben Fentner, ''persons who may have looked at themselves as . . . foremen.'' On occasion, Kenny, Fentner, or Harrison would preside over these meetings.

Steven Ching started working on the third floor. He testified that Superintendent John Coyle introduced him to Andrew Preston, whom Coyle characterized as the ''third floor foreman,'' and told Ching that he would be working ''for'' Preston. In his last week of employment, prior to his discharge, Ching worked on the first floor with Terry Harrison, who directed his work. Ching testified that Harrison selected employees for overtime work.

Randall Morgan testified that Harrison twice released him from work early, without asking anybody else for permission to do so.

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[3] G.C. Exh. 2.
[4] G.C. Exh. 4.
[5] G.C. Exh. 5.
[6] The pleadings establish that Bowman was a supervisor and an agent of Respondent.
[7] G.C. Exh. 4.

There is evidence that the employees knew that Harrison was expressing the opinions of his own superiors. Thus, Randall Morgan testified that, when telling him what to do, Harrison would say, ''Kenny (Bowman) wants this done.'' Harrison frequently called Bowman on the radio, or met with him, to discuss a work problem. James Spivey testified that Harrison handed him two warnings[8] and said: ''Kenny Bowman told me to write you up for these two violations.''

Harrison also did the same work as that performed by the employees.

3. Factual and legal conclusions on Harrison's status

Although Bowman and Harrison denied that the latter had indicia of supervisory authority, I credit the specific testimony of the General Counsel's witnesses that Harrison reassigned employees to different jobs once or twice a day, let at least one employee leave work early without seeking permission to do so, and assigned employees to overtime work. I also accept Harrison's testimony that he attended weekly meetings with Superintendent Coyle, General Foreman Bowman, and other individuals who ''may have looked at themselves as foremen,'' and occasionally presided over such meetings. Harrison would tell employees that General Foreman Bowman wanted them to do a particular work assignment. When disciplining an employee (Spivey), Harrison told him that it was being done on Bowman's order. Superintendent Coyle told Ching that Harrison's counterpart on the third floor (Preston) was the ''third floor foreman,'' and that Ching would be working ''for'' him.

The critical issue in making a determination of agency is whether under all the circumstances the employees would reasonably believe that the alleged agent was reflecting company policy and was speaking and acting for management. *Community Cash Stores*, 238 NLRB 265 (1978). The General Counsel relies principally on *Injected Rubber Products*, 258 NLRB 687 (1981). In that case the Board adopted the administrative law judge's conclusion that a particular individual was an agent of the employer based on the following criteria:

> (1) the employer made clear to employees that the leadman was the ''eyes of management,'' and conveyed its wishes; (2) the leadmen transmitted the employer's directives, and generally specified that they were acting on management's orders; (3) if the superintendent was called, the leadman made the call; and (4) the leadman kept the daily record of events.

In concluding that these criteria were met, the Board adopted the following language of the administrative law judge:

> Employees could reasonably believe that questioning by a leadman about the employees' union views was being undertaken at the direction of management and that the leadman would relay to management the information obtained through such questioning. Indeed, absent countervailing considerations, an . . . employee could not reasonably conclude otherwise [id. 258 NLRB at 692–693].

[8] The warnings to Spivey are discussed hereinafter.

On the basis of this and other authority,[9] the General Counsel argues that Harrison was Respondent's agent.

Other cases utilize one or more of the criteria in *Injected Rubber Products*, supra, or the facts established in this case, to reach a conclusion that the employee's actions were attributable to the employer. Thus, Harrison's statements were similar to those of other acknowledged supervisors.[10] Harrison independently allowed an employee to leave early,[11] and reassigned employees from one job to another once or twice a day.[12] An employee in a similar position was said by management to be a ''foreman,'' and that a new employee worked ''for'' him.[13] Harrison attended and occasionally presided at management meetings with acknowledged supervisors and other employees in comparable positions.[14]

Respondent cites authority leading to a contrary conclusion. In *Knogo Corp*., 265 NLRB 935 (1982), the employer stopped the alleged agent's distribution of an antiunion petition and reprimanded her, thus showing that it neither acquiesced in nor condoned the petition. In *Zack Co*., 278 NLRB 958 (1986), the Board found that the employee was neither an supervisor nor an agent because he did not have the indicia of supervisory authority.

Based on the authorities cited, I conclude that the employees could reasonably believe that Harrison was speaking or acting for management.[15]

Finally, Bowman learned of Harrison's statements, but did nothing to repudiate or disavow them. The Court of Appeals for the Seventh Circuit has concluded in similar circumstances that an employer's failure to disavow or repudiate threats and other coercive statements by supervisors made the employer ''responsible for these acts of its agents.'' *Altman Camera Co. v. NLRB*, 511 F.2d 319, 321 (7th Cir. 1975).

I find that Harrison was an agent of Respondent, and that his statements are attributable to it.

C. *The Company Owner's Speech and Alleged Unlawful Statements by General Foreman Bowman*

Union Organizer Ronald Burk showed up on January 21 wearing a union T-shirt. He testified that General Foreman Bowman told him that he had picked a ''bad day'' to wear that shirt, because the company owner was coming in. Bowman, on the other hand, contended that he told Burk that he could not have picked a ''better day'' to wear the shirt, since the owner was coming in. In light of the Company's opposi-

[9] *B-P Custom Building Products*, 251 NLRB 1337 (1980); *Einhorn Enterprises*, 279 NLRB 576 (1986).

[10] Harrison's threats of layoffs were similar to General Foreman Bowman's, made to Tommy Parker (infra), and Human Resource Manager Hoffman's statements to Thomas Biro, infra. Further, Harrison's statement that employees should not be ''hanging around'' was repeated by Bowman almost verbatim (''plodding around'') in Bowman's warning to Morgan the day after Harrison made his statements, infra. *L.A. Water Treatment*, 263 NLRB 244 (1982).

[11] *Bluebonnet Express*, 271 NLRB 433 (1984).

[12] *F. Mullins Construction*, 273 NLRB 1016 (1984).

[13] *Best Products Co*., 259 NLRB 95 (1981).

[14] *B-P Custom Building Products*, supra at 1337.

[15] *Knogo Corp*., supra, cited by Respondent, is inapposite, since the Respondent herein did not disavow Harrison's statements. The authority cited above also shows that *Zack Co*., supra, does not reflect the current postion of the Board.

tion to the Union, established by this record, Bowman's claimed approval of Burk's wearing a union T-shirt is highly unlikely. Further, Burk was a more truthful witness than Bowman. I credit Burk's testimony.

Ching testified without contradiction that he attended the meeting of the Company's production employees on January 21. He wore a union T-shirt and emblem. Tim Onnen, whom Ching described as the Company's owner, said that the employees would be better off without a Union, and that, if the employees voted for the Union, ''the Union guys would come in and take their jobs and they would go to the bottom of the list.'' Ching stood up, identified himself as a union member, and said that what Onnen had said was incorrect. I credit his uncontradicted testimony.[16]

Tommy Parker, a former employee, testified that he had a conversation with General Foreman Bowman about a week after Onnen's speech. Parker stated that he was not a member of the Union in January or February.[17]

According to Parker, Bowman approached him at his workstation. Parker was on a ladder, and Bowman asked him to come down and take a walk with Bowman. Parker complied, and they went to a ''secluded area'' where nobody else was present. Bowman said that, if the Union was voted in, the ''Union guys'' would take the employees' jobs. He added that Parker was a ''minority,'' and that this would not help him.

Bowman testified that he had a conversation with Parker shortly after Onnen's speech. He affirmed that he told Parker that the Company's ''human resources lady''[18] had said that union advocates could not ''harass'' employees on company time, and that if employees had any complaints about this, they could speak to Bowman. Bowman agreed that Parker did not complain about such harassment. Bowman denied saying anything else about the Union and specifically denied saying that, if the Union came in, union members would take over the employees' jobs.

Bowman said nothing about the circumstances of the conversation, i.e., that he called Parker down from a ladder and went to a secluded area. I credit Parker's uncontradicted testimony as to this fact. There would have been no point to isolation of Bowman and Parker during this conversation unless Bowman intended to say something he did not want anybody else to hear. Parker was an apparently truthful witness, and I credit his testimony that Bowman said that union members would take over the employees' jobs, and that Parker's being a ''minority'' would not help him.

I also credit Bowman's testimony that, in addition, he told Parker that the human resources director had said that union advocates could not harass employees, and that in such event the latter could complain to Bowman.

The General Counsel argues that Bowman's response to Parker, admitted by Bowman, was a separate violation of the Act, although not alleged.[19] Respondent moved to strike this portion of the General Counsel's brief on the ground that there was no motion to amend the complaint to include such an allegation. The General Counsel responded that Bowman's testimony was elicited on direct examination by company counsel, and that it was reasonably related in time and substance to the other matters being litigated.

The complaint alleges inter alia that Bowman, on or about January 21 or the next day, threatened employees with unspecified reprisals or discharge if they engaged in union activities, and with loss of jobs if they selected the union. I conclude that the new alleged violation is reasonably related to the other unfair labor practices attributed to Bowman. Since Bowman's testimony was elicited by company counsel, I further conclude that it was thoroughly litigated. Accordingly, I deny Respondent's motion to strike this portion of the General Counsel's brief. *Mademoiselle Knitwear*, 297 NLRB 272 fn. 2 (1989); *Crown Beer Distributors*, 296 NLRB 541 fn. 2 (1989); *Baughman Co.*, 248 NLRB 1346 fns. 2 & 7 (1980).

D. *The Reprimand of Randall Morgan*

1. Summary of the evidence

Morgan was reprimanded on the afternoon of Onnen's speech. Morgan testified that the speech lasted about 45 minutes to an hour, and ended at about 3 p.m. Morgan returned to his workspace, and went to the Port-O-Let.[20] When he returned, about 5 to 7 minutes later, General Foreman Bowman was waiting for him, and said that he should not be walking around without something in his hands. Morgan replied that he had gone to the Port-O-Let. Bowman responded that he did not care, and that Morgan should not be walking around without something in his hands.

A short time later, Morgan was told to go to Bowman's trailer, and was given a written warning stating that he had been nonproductive and out of his workplace. The document also alleges that he previously received an oral warning for talking too long at lunch.[21] Morgan stated that, as he left Bowman's office, the latter said: ''You'd better watch your ass, because they're out to get you.''

Bowman contended that he observed Morgan several times on January 21, just ''plodding around'' without anything in his hands. He also asserted that he had warned Morgan about lunch breaks—''they'' would all be hanging around after the lunchbreak was over. Bowman's conclusions were based on his observation of Morgan. ''I stood around and watched Randy,'' Bowman asserted. Asked whether this conduct was characteristic of Morgan, Bowman replied: ''Randy worked pretty good. Randy will kill time if you let him kill time.'' Bowman denied that Morgan was reprimanded for going to the Port-O-Let. He also denied that he told Morgan to ''watch his ass, because they were out to get him.''

2. Factual analysis

The Company knew that Morgan was on the Union's organizing committee, based on the Union's letter. There is no evidence that any other employee was warned about being

[16] The complaint does not allege that Onnen's statement violated the Act.

[17] Parker identified a ''yellow card'' which he had signed, and which was identified as G.C. Exh. 18. However, the exhibit was not offered in evidence. Parker was laid off on March 19, and an unfair labor practice charge was filed concerning the layoff. The charge was dismissed.

[18] A reference to Human Resources Manager Lynda Hoffman.

[19] G.C. Br. 5.

[20] Morgan at one point stated that he left his workspace at about 1:15 or 1:30 p.m. Since this was prior to Onnen's speech, I conclude that this was an inadvertent error.

[21] G.C. Exh. 10.

late after lunchbreaks, despite Bowman's acknowledgment that ''they'' hung around after the break was over. The record discloses that Terry Harrison ate lunch with the employees, including Morgan. I conclude that the admitted warning about the lunchbreaks constituted disparate application of discipline, although this is not alleged as a violation. However, it does manifest animus against Morgan.

Bowman's testimony that Morgan was just ''plodding around'' sounds much like Harrison's warning that the employees should not be ''hanging around,'' because of the Union. Bowman's contention is weakened by his admission that Morgan ''worked pretty good.'' Morgan appeared to be a more truthful witness than Bowman, and I credit his testimony that he was warned because he went to the Port-O-Let for 5 to 7 minutes, without carrying anything in his hands. I also credit Morgan's testimony that Bowman told him to ''watch his ass, because they were out to get him.''

E. *The Warnings and Discharge of James Spivey*

1. Spivey's employment history and union activities

Spivey was hired on December 15, 1992, and was one of the employees assigned to Terry Harrison. Harrison testified that he told General Foreman Bowman to fire Spivey because he was unproductive. Bowman did not do so. Spivey acknowledged that, about 3 days after his employment, Superintendent John Coyle asked him about his productivity. Spivey explained to Coyle that he did not know where various tools were. Coyle replied that he ''figured'' this was what it was. According to Spivey, this was ''the end of it.'' Spivey did not receive a warning until after he engaged in union activities, and the company owner made a speech about the Union.

Spivey ate lunch with the other employees in Harrison's group. As indicated, Harrison ate lunch with them. The employees talked openly about the Union during these lunch periods, and Ching and Morgan attempted to get Harrison to sign a union card, without success. Spivey obtained the signature of two other employees on union cards at lunchtime, and himself signed a card.[22] Spivey attended two or three union meetings, including the one held on January 20. As described above, Harrison made various statements about the Union on January 20 and 21, including a statement to Spivey that Harrison had to ''keep a close eye on you guys now that this shit's out.'' Harrison denied knowledge of Spivey's union activities.

2. The first two warnings

a. *Summary of the evidence*

Spivey was given two warnings on January 21, the day of Onnen's speech. General Foreman Bowman testified that he was on the second floor of the unfinished building in the ''observation deal in the high bay,'' and observed Spivey a floor below, playing with a ruler for 15–20 minutes, ''purposely killing time'' according to Bowman. He called for Terry Harrison and told him to watch Spivey. Harrison did so, and concurred with Bowman's observation. Bowman then instructed Harrison to give Spivey a warning. Harrison demurred, but Bowman insisted—according to Harrison, Bowman ''forced'' Harrison to give Spivey the warning.

Harrison contended that he then went to Spivey's workstation to deliver ''the first one'' (warning). According to Harrison, Spivey was standing on the top step of a ladder, which, Harrison stated, was a safety violation. Harrison then reported this to Bowman, who told Harrison to ''write him up again.'' Accordingly, Harrison gave Spivey two warnings.

The first warning stated that Spivey was ''unproductive, it seems that you waste time on purpose.''[23] Spivey testified that he asked Harrison the meaning of this warning. According to Spivey's uncontradicted testimony, Harrison replied that he did not know what it was all about, and gave no explanation except to say that Bowman told him to write up Spivey for these two violations.

The second warning stated that Spivey had been standing on the top step of a 10-foot ladder, a safety violation.[24] As set forth above, Harrison asserted that, as he was approaching Spivey to give him the reprimand, Spivey was standing on ''the very top step.'' This top step had instructions not to stand on it, and Spivey was standing on these instructions. Harrison reported this to Bowman, who directed Harrison to write up Spivey a second time.

Spivey testified on direct examination that, earlier in the day, he had been standing on the step below the top step of a ladder. On cross-examination, he stated that he had been standing on the top step, and that this was customary practice. Harrison's order not to stand on the top step was the first that Spivey had received of this nature. As indicated, Spivey testified that he obeyed Harrison's instruction to get a taller ladder. On cross-examination, Spivey both affirmed and denied that there was a legend on the top step prohibiting standing on it.

Wayne Abbott was the safety coordinator for the general contractor at the jobsite (Metric Constructors). He testified that standing on the top step of a ladder would not be in compliance with safety regulations. These are regulations of the Occupational Safety and Health Administration (OSHA). Abbott stated that he had a copy of these regulations. However, he agreed that the general contractor did not distribute copies of these regulations to Respondent herein.

b. *Factual analysis*

I credit Spivey's uncontradicted testimony that he asked Harrison the meaning of the ''wasting time'' warning, and that Harrison failed to answer. Accordingly, Spivey had no opportunity to respond to Bowman's claim that Spivey had been playing with a ruler for 15–20 minutes—Spivey never heard the accusation, and it was not stated in the written warning. I also note that, although Harrison claimed that he saw the actions in which Spivey was assertedly engaged, Harrison resisted Bowman's instruction to write up Spivey for wasting time until Bowman forced Harrison to write it. I also consider Harrison's testimony that, when he approached Spivey to give him the wasting time warning, Spivey was standing on the top step of a ladder, apparently working rather than wasting time. In these circumstances, I do not credit Respondent's evidence of Spivey's wasting time.

[22] G.C. Exh. 19.

[23] G.C. Exh. 21.

[24] G.C. Exh. 20.

With respect to the second warning, I credit Spivey's testimony, elicited on cross-examination, that he was in fact standing on the top step of a ladder. Was there any legend on this step? Harrison asserted that there was a legend prohibiting standing on the top step. But Harrison was 10 feet below the legend on which Spivey was assertedly standing. Spivey, on the other hand, gave contradictory testimony on this issue. Because of the inconclusive nature of this evidence, I make no finding as to whether there was such a legend on the top step.

I credit Spivey's testimony of the way in which the ladder incident arose. Earlier in the day, he had been standing on the top step of a ladder. Harrison told him not to do so, and to get a taller ladder. Spivey complied. I credit Spivey's testimony that this was the first time anybody had told him not to stand on the top step. I note Abbott's admission that he never distributed the OSHA regulations to Respondent.

3. The third warning and Spivey's discharge

Spivey was replacing some light bulbs in hallways on January 29 and could not reach a few of them. He searched for a ladder, but could not find one. A pallet was leaning up against a wall, and Spivey stepped onto it, about one foot off the floor. As he did so, Metric Safety Coordinator Wayne Abbott came up, laughed, and said ''I gotcha, I gotcha.'' Abbott informed Spivey that he would write him for violating a safety regulation. Spivey acknowledged that standing on the pallet was ''probably unsafe.'' Abbott confirmed that he wrote up the violation[25] and delivered it to Respondent.

Company Superintendent John Coyle then signed a notice dated January 29, informing Spivey that this was his third and final notice, and that he was terminated for using a pallet instead of a ladder.[26] General Foreman Bowman also testified that the last reprimand was Spivey's third and final notice. Another reason for the discharge was that Spivey had been ''lazy since day one.'' Bowman could not recall any prior discharge of an employee for violating a safety regulation.

F. *Threats Attributed to Human Resources Manager Lynda Hoffman*

1. Summary of the evidence

On January 25, the Union filed a petition for an election.[27] In late January, Ching, Morgan, and Burk engaged in a strike of 2 to 3 days duration, and then returned to work. Human Resources Manager Lynda Hoffman visited the jobsite in February.[28]

According to Thomas Biro, who was not a union member, Hoffman met with all the employees. Biro was called to the company trailer for an individual interview with her. It lasted about 30 to 40 minutes. The stated purpose was to discuss the Company's retirement plan. After that topic was covered, Hoffman asked how things were going on the job. Biro replied that everything was all right, except for employee objections to an allegedly pornographic picture in the trailer. Hoffman said that she would look into it, and then asked how everything else was going. Biro replied that there was some tension on the jobsite. Hoffman responded by saying that, when unions come on the job, tensions build between management and employees. It was not in the employees' interest to join the Union. If it did come in, the employees would probably lose their jobs, and go on a waiting list while other employees got their jobs. Hoffman asked whether the cause of the strike was the pornographic picture. Biro told Hoffman that he was not a member of the Union, and had not considered joining it.

Hoffman testified that she had individual meetings with employees about their retirement plans. After this discussion, she asked how things were going, and some employees responded that they were being harassed by union members. Hoffman discussed the pros and cons of unionism, told them that they did not have to listen to union proponents, and stated that the Union could not give them anything more than they already had. Hoffman denied ''threatening'' employees.

The human resources manager was asked whether she recalled a conversation with Biro. She replied that she was ''sure'' she had spoken with him, but did not connect that name in the ''documentation'' with his face until she saw him in the courtroom.

2. Factual analysis

Biro had better recall of this conversation, and described it in detail, including the reference to the pornographic picture. Hoffman, on the other hand, was only ''sure'' that she had talked with Biro, and acknowledged that she did not connect his name in the ''documentation'' until she saw him in the courtroom. Based on Biro's better memory of the meeting, and the fact that he appeared to be truthful witness, I credit his version of the conversation with Hoffman.

G. *The Discharge of Stephen Ching*

1. Summary of the evidence

a. *Respondent's policy on absenteeism*

As indicated, Ching engaged in a short strike with other union supporters in late January. He also engaged in another strike beginning in late March, which lasted several weeks. He was discharged on May 25, allegedly for falsifying a company document listing a planned absence from work on May 21.

The document in question was a calendar for May 1993, which hung in Bowman's trailer office. The Company did not keep any calendars prior to that month. There is conflicting evidence on whether the employees were required to write their names in the space on the calendar when they planned to be off work.

Ching testified that, when he was first hired, he was told to put his name on the calendar when he planned a day off. Ching kept a log of his absences from work, either for a full day or part of a day, from August 3, 1992, through May 21, 1993. The log shows that he planned three vacations during that time period prior to May 21, and, in each instance, put his name on the calendar. He did not do so in cases of sick-

[25] The reprimand reads: ''Standing on pallet instal temp lights. Mesner needs to furnish ladder so pallets can [sic] be used.'' R. Exh. 3.

[26] G.C. Exh. 22.

[27] G.C. Exh. 4.

[28] The pleading establish that Hoffman was a supervior and an agent of Respondent. Her office was in Delray Beach, Florida.

ness or emergencies, and in some cases, did not call in.[29] He was absent because of illness on August 3, 1992, and Superintendent Coyle told him that he either had to have his name on the calendar or call in. Ching testified that he was never disciplined for failing to call in, and that no employee had been discharged for 1 day's absence without permission.

Gary Bostwick, a former employee, testified that the ''official'' procedure when an employee was planning a vacation was to sign an ''off day'' or ''vacation'' sheet, and identified a document of this nature.[30] Although the document refers to ''holiday pay,'' Bostwick asserted his understanding that it covered both vacations and holidays.[31] Bostwick himself did not use this form, and started putting his name on the calendar only after Ching's discharge.

Randall Morgan testified that he put his name on the calendar once. However, on three other occasions he was absent from work without permission. After one such absence, he was told that he should start thinking about calling in if he was not going to show up for work.

General Foreman Bowman testified that when employees planned to take time off, they were to consult with him, get his permission, and then place their names on the calendar. When Ching was absent on May 21—the event which triggered his discharge allegedly because he falsified the calendar—Bowman wrote a warning to Ching for being ''absent without calling in.''[32]

b. *Ching's absence on May 21—the calendar entries*

There are three entries in the May 21 block on the calendar. The first entry appears to be ''Darryl,'' and, below it, the word ''off.'' Both words are crossed out. Below this entry are the words, ''Ching Off.'' Underneath Ching's name are the words ''Ben off,'' which are crossed out.[33]

Ching testified that May 21 was his birthday, and that he had received a social invitation for that day. He placed his name in the May 21 block 2 or 3 days before May 21 (a Friday). Ching stated that Ben Fentner's name was in the block, but was scratched off. Darryl Porter's name was not there. Ching identified Fentner as the third floor ''foreman,'' and Porter as a laborer.

Barry Bostwick testified that he himself had been planning a vacation, and looked at the calendar ''a couple of days, a week'' before Ching's birthday. He then saw Ching's name on the calendar, and other names crossed off. Bostwick was not certain of the exact date he saw the calendar.

Randall Morgan testified that Ching informed him in advance that he planned to take off on May 21, his birthday. At about 1 p.m. on May 21, Morgan went to Bowman's trailer to get a drill bit. He testified that he looked at the calendar, and that Ching's name was in the May 21 block. Morgan was shown the calendar, and affirmed that all he saw was Ching's name, and ''Ben's,'' the latter crossed off. Morgan testified that the words ''Darryl off'' were not on the calendar when he saw it on May 21. During the day, Bowman asked Morgan where Ching was, and Morgan replied that he was off because it was his birthday.

Darryl Porter, a former employee and witness for Respondent, testified that, in April, he put his name on the calendar for the dates of May 19, 20, and 21. Later, Bowman told him that he had a schedule to finish, and that Porter could not have those days off. Accordingly, a week or two before May 19, Porter scratched his name off the calendar. He asserted that Ching's name was not on the calendar when he placed his name there (in April), or when he crossed it off (a week or two before May 19). The calendar shows ''Darryl off'' for May 19, 20, and 21.[34]

Ben Fentner, a leadman or foreman, testified that he put his name on the calendar for a week beginning May 19. Later, Bowman told him that work had to be completed, and Fentner crossed out his name for May 19, 20, and 21. He did this on May 12. According to Fentner, Ching's name was not on the calendar when Fentner wrote his name on it, or when he crossed it out.

David Morris, a material handler who kept paperwork in Bowman's trailer, testified that when Randall Morgan arrived on Friday morning, several employees asked where his ''buddy'' was, and Morgan replied that Ching did not work on his birthday. Bowman, who was standing outside, came in and asked Morris whether Ching's name was on the calendar. Morris testified that he examined it, that Ching's name was not on it, but ''Ben's'' and ''Darryl's'' were there, both scratched through. On Friday, Bowman asked Morris whether he would sign a statement about the absence of Ching's name on the calendar.

General Foreman Bowman testified that, when Ching did not arrive Friday morning, he checked the calendar and did not see Ching's name. He asked David Morris to look at the calendar, and the latter informed him that Ching's name was not on it. Bowman checked to ascertain whether Ching had called in, and determined that he had not done so. Bowman reported this fact by phone to Human Resources Manager Hoffman, who instructed Bowman to write up a warning for Ching. Bowman did so.[35]

Caroll Fitzwater, a former superintendent, had his own office. He testified that Bowman called him on Friday, May 21, and asked whether Ching had called in. Fitzwater asserted that Bowman's office was open on Saturday, and that he, Fitzwater, was in that office and noticed that Ching's name was not on the calendar. Fitzwater averred that he had a conversation with Bowman, but could not recall whether the absence of Ching's name on the calendar was discussed.

Fitzwater stated that there were other crossed out names in the May 21 block, but could not remember who they were. Fitzwater testified that he examined the calendar for his own purposes, ''for vacation basically.'' He also testified that there was an ''out'' vacation calendar in his own office, and that this was the one which he would have signed. Bow-

[29] G.C. Exh. 16.

[30] G.C. Exh. 7.

[31] The exhibit contains a memorandum to employees from Human Resource Manager Lynda Hoffman, entitled ''1993 Holiday Schedule and Policy.'' The memorandum states that attached forms must be used ''when requesting a day off, either before or after the holiday.'' The form itself is entitled, ''Request for an Excused Absence (before or after a Holiday).'' In the text, the employee requests an ''excused absence'' on a speecific day. Underneath this, he checks one of two statements: (1) ''I would like to use a paid vacation day,'' or (2) ''This absence is an unpaid off.'' Ibid.

[32] R. Exh. 6. As described hereinafter, this warning was not delivered to Ching.

[33] G.C. Exh. 8.

[34] G.C. Exh. 8.

[35] R. Exh. 6.

man also asserted that Fitzwater was in the trailer on Saturday morning.

c. *Ching's return to work on Monday, May 24*

Ching testified that he returned to work shortly before 7 a.m. on May 24. He first had a safety meeting with the Company's safety specialist (Joe Mazurek), and told him there were some cracked floor boards over a tunnel, and that there was danger that an employee could fall through. Mazurek replied that this was the general contractor's problem, and that he would relay the complaint. The safety meeting ended at about 7:10 or 7:15 a.m. Bowman was present at the meeting and heard Ching's complaint.

Ching affirmed that he then went to his workstation on the first floor, that he needed to bend some pipe, and went to the second floor which had the only pipe bender on the site. He took the pipe with him, assembled the bender, and bent the pipe in about 5 to 10 minutes. Ching then returned to his workstation at about 7:30 a.m.[36] General Foreman Bowman and Metric's safety specialist, Wayne Abbott, were waiting for him. Ching and Abbott first discussed the safety problem of the cracked boards, and Abbott left. Abbott agreed that Ching had filed prior safety complaints with OSHA.

Bowman then asked Ching where he had been the prior Friday. Ching replied that it was his birthday, and that he took the day off. Bowman stated that Ching had not called in. The latter replied that he never had to do this before, and that he had put his name on the calendar. Bowman asserted that Ching had to call in, and the employee replied that he would do so thereafter. Bowman said he would have to write up Ching for failure to call in.

Bowman and Metric Safety Specialist Wayne Abbott testified to similar effect with one significant variation—Ching did not arrive until 8 a.m. Abbott stated that Mazurek called him about a safety complaint made by Ching, and that he immediately went to Ching's worksite. Bowman arrived a few minutes later. According to Abbott, he and Bowman stood at Ching's worksite for 40 to 45 minutes talking about the weekend. Bowman did not attempt to locate Ching by radio. Finally, according to Bowman's and Abbott's version, Ching showed up at 8 a.m., carrying a piece of bent pipe according to Bowman.

After Ching concluded his safety discussion with Abbott, Bowman had the discussion with him recited by Ching. When the latter contended that his name was on the calendar, Bowman did not deny it. He went back to the trailer, and saw Ching's name in the May 21 block of the calendar, assertedly for the first time.

Fitzwater testified that Ching's name was on the calendar on Monday. He further asserted that Bowman then pointed to the name and asked him whether it had been on the calendar the prior Saturday. Fitzwater replied that it had not been there.

Bowman called Human Resources Manager Hoffman and reported that he had a reprimand for Ching for not calling in on Friday, but that Ching's name had suddenly appeared on the calendar. Hoffman called him back thereafter, instructed him not to deliver the reprimand, and stated that she was planning to terminate Ching for falsifying company documents.

d. *Ching's discharge on May 25*

Hoffman testified that she called her attorney after Bowman told her that Ching's name had appeared on the calendar on Monday morning. Thereafter, she decided that she had to speak to all of the people who were involved or had any knowledge of the matter.

Hoffman went up to the jobsite on Tuesday morning, and obtained statements from Bowman, Fitzwater, and Morris. At that point, she concluded that Ching's name had not been on the calendar the preceding Friday or Saturday, but had appeared on Monday. She did not interview Morgan or Bostwick and did not hear Ching's version until the discharge interview. Hoffman testified that Bowman told her that Ching had denied the accusation. After interviewing Bowman, Fitzwater, and Morris, Hoffman ''felt that Ching's falsification and lying about the situation and the calendar were grounds for dismissal.''

Ching had worked through the prior day, Monday, and through Tuesday until 3 p.m. He was then called to Project Manager Susin's office, where Hoffman and Bowman were present. Susin and Hoffman told him that he was being terminated for falsifying company documents. Ching asked them what they meant, and they stated that his name was not on the calendar prior to his day off. Ching then asked for a NASA compliance officer to be present as a witness, and the Company denied this request—Hoffman contended that no ''outside'' organization should be present.

The argument over whether Ching's name had been on the calendar prior to his day off continued for some time. ''I've done it three times before, why would I change?'' Ching asked the Company. Ching denied at the hearing that he had placed his name on the calendar after his day off.

The Company's decision was unchanged. Ching returned some company items, and asked for a termination slip. ''We don't give that,'' Hoffman replied, and refused the request.

Hoffman was asked repeatedly on cross-examination whether the calendar incident was the reason for Ching's discharge. She replied that Ching's entire work history had to be considered, but that, in the final analysis, it was the calendar incident which ''stood out.'' Asked if Ching would still be employed if the calendar incident had not occurred, Hoffman replied, ''I can't say that.[37]

e. *Biro's conversation with Bowman*

Tom Biro was laid off by the Company in February 1993. An unfair labor practice charge was filed, but no complaint issued.

[36] The company witnesses denied this arrival time, and Ching reaffirmed it on rebuttal.

[37] Thing testified that he and Burk were working outside on March 16 preparing an area for a concrete pour. It started raining, and Ching saw lightning. He took shelter inside a vehicle. Bowman denied that there was ''heavy'' lightning and stated that he had a time limit on pouring concrete. He had other employees do the work. Bowman discussed with Project Manager Susin the possibility of docking Ching's pay, but did not do so. The next day Susin issued a written warning to Ching for ''wasting time'' because he was looking for materials ''out of his area'' (G.C. Exh. 15). On one occasion, Bowman saw Ching working outside without his shirt on and told him to put it on. Hoffman testified that she was aware of verbal and other reprimands issued to Ching.

Biro had a conversation with Bowman about a year later, in March 1994. It took place in a ''bikers' bar'' in Daytona. Bowman approached Biro, and the two conversed for 20 to 30 minutes. According to Biro, Bowman said that he had no complaints against Biro, and told him that the reason he was laid off was ''that slant-eyed communist son of a bitch'' that Biro ''hung around with,'' and his ''buddies,'' who caused ''a lot of grief on the job.''[38]

Bowman agreed that he had a conversation with Biro in March 1994, in Daytona. According to Bowman, it lasted only a few minutes. He just asked Biro how he was doing, and denied talking about the Union, union organizers, or the reasons for Biro's layoff.

Biro's testimony had more details, and the statement he attributes to Bowman is supported by Ching's EEOC complaint. I credit Biro's testimony.

2. Factual analysis

As set forth above, Ching testified that he placed his name in the May 21 block 2 or 3 days before that date. Bostwick affirmed that he planned a vacation himself, and saw Ching's name in the May 21 block ''a couple of days, a week before'' May 21, but was not certain of the date. This is close enough to constitute corroboration.

Morgan's testimony was more precise as to the date—he went to the trailer at 1 p.m. on May 21, and saw Ching's name.

Fentner's testimony does not rebut the General Counsel's evidence. He asserted that he crossed his name off the calendar on May 12, i.e., about a week before Ching put his name there. Accordingly, Fentner would not have seen it. The same reasoning applies to Darryl Porter's testimony, who contended that he crossed his name off the calendar a week or two before May 19.

Fitzwater's testimony that he did not see Ching's name on Saturday, May 22, has several faults. Fitzwater claims that Ching's name was not on the calendar, and that he had a conversation with Bowman, but could not recall whether the calendar issue was discussed. Why did Bowman wait until the following Monday to ask Fitzwater whether Ching's name was on the calendar the preceding Saturday?

A more basic inconsistency is Fitzwater's claim that he looked at the calendar in Bowman's trailer because he was planning his own vacation, while admitting that it was another calendar in his own office which he would have signed for this purpose.

The testimony of Bowman and Morris raises other questions. Why did Bowman, on May 21, ask Morris whether Ching's name was on the calendar? Bowman could obviously have examined the calendar himself. Why did the General Foreman ask Morris on the same day whether he would sign a statement that Ching's name was not on the calendar? Taking Respondent's evidence at face value, all it had established by May 21 was that Ching's name was not on the calendar, and that he had not called in—there was no ''falsification'' issue at that point. The evidence in this case does not establish that the Company had a system of discipline which would have required a corroborating statement that an employee had failed to call in. Its policy on unexcused absences was lax.

Coming next to the following Monday, the only time during which Ching could have placed his name on the calendar is the interval between the safety meeting on Monday morning, and his meeting with Bowman and Abbott. Ching affirmed that he arrived at his worksite at about 7:30 a.m. His claim that he went to the second floor to bend some pipe is corroborated by Bowman's admission that Ching arrived with the bent pipe in hand. Bowman's and Abbott's testimony that Ching did not arrive until 8 a.m., and that the waiting two of them stood around waiting for him, would be unusual in a busy construction site. Bowman knew that Ching had reported for work because he saw and heard him at the safety meeting. Yet Bowman did not attempt to locate Ching by radio and, instead, supposedly stood around for 40 to 45 minutes talking with Abbott about the weekend. This is unrealistic. Respondent argues that I should credit Abbott, because he was employed by another employer and had no bias.[39] But Abbot had to contend with Ching's filing of complaints with OSHA, and Abbott himself had filed a complaint against Spivey, laughing and saying, ''I gotcha, I gotcha.''

The Company never answered Ching's question put to them at the discharge interview—since he had placed his name on the calendar on all prior occasions when he took a planned vacation, why would he have failed to do so on May 21? It may further be asked why he would have engaged in the risky behavior of ''falsifying'' the calendar between 7:30 and 8 a.m., when there was no evidence that the Company had discharged any employee because of an unexcused absence.

The Company's evidence thus either fails to rebut the testimony of the General Counsel's witnesses, or is internally inconsistent, or improbable. Ching's argument that he would not have failed to do that which he had done in the past is persuasive, while the risk inherent in his doing what the Company alleged, for little or no apparent reason, is an additional argument that it never took place. Ching, Morgan, and Bostwick were apparently truthful witnesses, and I credit their testimony that Ching placed his name in the May 21 block prior to that date.[40]

There is little or no conflict about the facts concerning the discharge. When Bowman told Hoffman on May 24 about the asserted appearance of Ching's name on the calendar, she consulted a lawyer, and decided that she had to talk to all of the people involved. However, the only persons she interviewed were Bowman, Fitzwater, and Morris. Neither Ching, Morgan, nor Bostwick was interviewed before a decision was made to terminate Ching. On May 21, Bowman asked Morgan about Ching, yet Hoffman did not question him when investigating the case 4 days later. Nor did she question Ching, despite Bowman's report to her that Ching had denied the accusation.

The facts of the exit interview are clear. The Company announced its reason for terminating Ching, and he denied it. Ching asked for a witness, but the Company denied the re-

[38] On July 13, 1993, Ching filed a complaint with the EEOC alleging that the Company had discriminated against him because he was of the ''Asian race'' (R. Exh. 1).

[39] R. Br. 30.

[40] There is a conflict as to whether Darryl Porter's name, crossed off, was on the calendar. Porter and Morris affirmed that it was. Ching and Morgan agreed that Fentner's name was on the calendar, crossed out, but denied that Porter's was there. Morgan saw the calendar on May 21. I make no finding on this issue.

quest on the ground that the requested witness was employed by an ''outside'' organization—a government agency which had charge of the Kennedy Space Center where Respondent was performing its work. Finally, when Ching asked for a termination slip, the Company also denied this request.

H. *Legal Conclusions*

1. The violations of Section 8(a)(1)

I have concluded that Terry Harrison was a company agent. Spivey's testimony, augmented by Harrison's admissions, establish that Harrison told employees on January 20 the Company would have a video camera in the Holiday Inn parking lot where a union meeting was scheduled, that Harrison had to keep an eye on the employees because the ''union boys were running their mouths,'' and (to Spivey), that he had to keep a close eye'' on the employees ''now that all this shit's out.'' These statements constituted threats of surveillance of the employees' union activities and were unlawful under established Board law.

Harrison's further admission that he told employees that there was a likelihood of layoffs because of the Union, and that employees should not be ''hanging around'' because the Union was going to cause them problems were also unlawful. His statement about the Company ''pushing harder'' because of the Union was a threat of more onerous working conditions. All of these statements were coercive.

General Foreman Bowman's statement to Parker that the union members would take the employees' jobs if the Union was voted in was unlawful. His statement to Burk that the latter had picked a bad day to wear a union T-shirt, because the company owner was coming in, constituted a threat of unspecified reprisals. Bowman's further statement that Human Resources Manager Hoffman had said that union advocates could not ''harass'' employees on company time, and that they could report this to Bowman, coupled with the fact that Parker had not complained of harassment, also violated Section 8(a)(1). Statements of this nature encourage employees to report solicitations which are subjectively offensive to them and discourage union supporters from engaging in protected activity. *Eastern Maine Medical Center*, 277 NLRB 1374 (1985).[41]

Human Resources Director Hoffman's statement to Thomas Biro, that the employees would probably lose their jobs if the Union came in, is similar to the statements by Harrison and Bowman and was also unlawful.

2. The violations of Section 8(a)(3)

a. *Applicable principles*

The General Counsel has the burden of establishing a prima facie case that is sufficient to support the inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.[42]

[41] Accord: *C.O.W. Industries*, 276 NLRB 960 (1985).

[42] *Wright Line*, 215 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983).

b. *The warning issued to Randall Morgan*

As indicated, Bowman gave Morgan a warning on January 21, for being nonproductive and out of his work area. The Company knew that Morgan was a proponent of the Union, because of the Union's letter announcing that he was on the organizing committee. Respondent's coercive statements to employees outlined above establish its antiunion animus. Additionally, the Company warned Morgan about being late after lunchbreaks, without warning other employees who were also late. Bowman's statement that Morgan should ''watch his ass, because they were out to get him,'' constitutes further evidence of the unlawful nature of the warning. Finally, the timing of the reprimand, on the day of Company Owner Onnen's speech, and the fact that the warning is not supported by the facts, constitute additional evidence that it was discriminatory and violated Section 8(a)(3) and (1). I so find.

c. *The warnings and discharge of James Spivey*

Spivey attended union meetings and signed a union card. He obtained two signatures on union cards at lunchtime, when Company Agent Harrison customarily ate with the employees. After Harrison had made statements about the Union to other employees, he made another to Spivey alone, that Harrison would have to keep a ''close eye on you guys.'' I conclude that the Company knew that Spivey was a supporter of the Union.

On January 21, the day after Onnen's speech, Respondent gave Spivey two warnings. The first was for being ''unproductive.'' Harrison, on orders from General Foreman Bowman, delivered this warning to Spivey. When Spivey asked what it meant, Harrison replied that he did not know and said that Bowman had instructed him to deliver it.

The second warning admonished Spivey for standing on the top step of a ladder, despite the fact that Spivey had never been warned against this practice in the past. OSHA's supposed regulations making this a safety violation are not in evidence. The general contractor's safety officer admitted that he did not deliver such regulations to Respondent, and there is no evidence of the latter's promulgation of any safety rules. Further, the alleged ladder violation actually took place prior to the asserted wasting time incident. All that Harrison did then was tell Spivey to get a taller ladder. Spivey complied, and it did not occur to Harrison to report this to Bowman until the latter insisted that Harrison write up Spivey for the ''wasting time'' violation. The second reprimand was actually an afterthought.

I conclude that both warnings were motivated by Spivey's union activities, and that the General Counsel has established a prima facie case. It may be noted that three warnings—two to Spivey and one to Morgan—were issued on the day of Onnen's speech. Respondent has not established it would have issued such warnings in the absence of Spivey's union activities. Accordingly, the warnings violated Section 8(a)(3) and (1) of the Act.

Although Spivey was issued a third warning on January 29, the complaint does not allege that it was unlawful. This was the incident where Spivey was standing on a pallet. However, both the termination notice and Bowman's testimony establish that the principal reason for the discharge was the fact that this was the ''third'' safety warning. But

the first two warnings were discriminatory. Further, there is no evidence of a progressive disciplinary procedure which would have mandated Spivey's discharge, and Bowman admitted that he could not recall any other discharge because of a safety violation.

Although Bowman asserted that an additional reason was the fact that Spivey had been ''lazy since day one,'' and Harrison contended that he recommended Spivey's discharge soon after he was hired, Respondent took no action on this issue, not even a warning, until Spivey engaged in union activities. This timing constitutes evidence that it was the union activity rather than the asserted laziness which was a factor in the decision to discharge Spivey.

I conclude that the General Counsel has established a prima facie case, and that Respondent has not rebutted it. Accordingly, Spivey's discharge violated Section 8(a)(3) and (1).

d. *The discharge of Stephen Ching*

Ching was the leader of the union movement. This fact, Bowman's statement to Biro, about Ching's ''communist'' activities and ''grief on the job,'' and the other evidence of Respondent's antiunion animus, establish the General Counsel's prima facie case.

The Company's asserted reason for Ching's discharge, falsification of a company document, is not born out by the believable evidence. Indeed, the history of the falsification issue suggests that the Company engaged in an elaborate charade in order to manufacture a reason for Ching's discharge.

The discharge procedure contains additional evidence of unlawful motivation. Although Hoffman stated a need to interview all persons involved in the asserted falsification of the calendar, she failed to interview Bostwick, Morgan, or Ching himself. The Company believed that Morgan knew something about Ching's absence on May 21, since Bowman asked Morgan about it. Also, Hoffman supposedly believed that Ching had denied the accusation,[43] yet did not question him before deciding to terminate him. It is established Board law that an employer's failure to conduct a fair investigation of alleged misconduct prior to discipline is evidence of discriminatory motivation. See, e.g., *Aratex Services*, 300 NLRB 115 (1990); *Minnesota Boxed Meat*, 282 NLRB 1208 (1987). Additional evidence of discrimination was Hoffman's evasive testimony on whether the asserted falsification was the sole reason for Ching's discharge.

The fact that Ching filed a charge with another Federal agency alleging that his race was the reason for the discharge does not invalidate the objective evidence in this case that his activities protected by the Act were a factor in the employer's decision to discharge him. This is all that *Wright Line*, supra, requires to establish a prima facie case. Respondent can scarcely be heard to argue that it has rebutted the prima facie case because the real motivation for the discharge was a reason unlawful under another statute.

I conclude that Respondent unlawfully discharged Ching on May 25, 1993, in violation of Section 8(a)(3) and (1) of the Act.

[43] Although Hoffman contended that Bowman told her that Ching had denied the falsification charge, the only evidence petaining to this is that Ching told Bowman that his name was on the calendar.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Meisner Electric, Inc. of Florida is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union #756, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Threatening its employees with surveillance of their union activities.

(b) Threatening its employees with loss of jobs or discharge it they selected the aboved-name Union as their bargaining representative.

(c) Threatening employees with more onerous working conditions because of their union activities.

(d) Threatening employees with unspecified reprisals if they wore union insignia.

(e) Telling employees that they can report to management that other employees are soliciting them to join the Union, where the solicited employees have not complained of same.

4. Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct because of the named employees union activities:

(a) On January 21, 1993, issuing a disciplinary reprimand to employee Randall Morgan, and two such reprimands to employee James Spivey.

(b) On January 29, 1993, discharging employee James Spivey.

(c) On May 25, 1993, discharging employee Stephen Ching.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully discharged employee James Spivey on January 29, 1993, and employee Stephen Ching on May 25, 1993, it is recommended that Respondent be ordered to offer them reinstatement to their former positions, without prejudice to their seniority or other rights and privileges or, if any such positions do not exist, to substantially equivalent positions, dismissing, if necessary, any employees hired to fill these positions, and to make them whole for any loss of earnings they may have suffered by reason of Respondent's unlawful conduct by paying each of them a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[44]

[44] Under *New Horizons*, interest is computed at the ''short term Federal rate'' for the underpayment of taxes as set out in the 1986

I shall further recommend that issues concerning the duration of the remedy, including the issues of whether the job is finished, and, if so, whether Spivey and Ching would have been transferred to other jobsites, be left to the compliance stage of the proceeding. *Dean General Contractors*, 285 NLRB 573 (1988); *Elion Concrete*, 299 NLRB 1 (1980).

I shall also recommend rescission of the unlawful reprimands issued to Spivey and Morgan, an expunction order, and the posting of notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[45]

ORDER

The Respondent, Meisner Electric, Inc. of Florida, Delray Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with surveillance of their union activities.

(b) Threatening its employees with loss of jobs or discharge if they select the Union as their bargaining representative.

(c) Threatening employees with more onerous working conditions because of their union activities.

(d) Threatening employees with unspecified reprisals if they wear union insignia.

(e) Telling employees that they can report to management that other employees are soliciting them to join the Union, where the solicited employee has not complained of the same.

(f) Discouraging membership in International Brotherhood of Electrical Workers, Local Union #756, AFL–CIO, or any other labor organization, by discharging or reprimanding employees in retaliation for their union activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer James Spivey and Stephen Ching reinstatement to their former positions, or if any such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary, any employees hired to fill the positions, and make each of them whole for any loss of earnings either may have suffered by reason of Respondent's unlawful discharges of them, in the manner described in the remedy section of this decision.

(b) Rescind the warning issued to Randall Morgan, and the two warnings issued to employee James Spivey, all on January 21, 1993.

(c) Expunge from its records all references to the discipline of employees listed in paragraphs (a) and (b) above, and notify each employee in writing that this has been done, and that it will not rely on any such discipline as a ground for future discipline of them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its jobsite at the Kennedy Space Center, and at its office in Delray Beach, Florida, copies of the attached notice marked ''Appendix.''[46] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days of the date of this Order what steps the Respondent has taken to comply.

amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).

[45] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[46] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with surveillance of their union activities.

WE WILL NOT threaten our employees with loss of jobs or discharge if they select International Brotherhood of Electrical Workers, Local Union #756, AFL–CIO, or any other labor organization, as their bargaining representative.

WE WILL NOT threaten our employees with more onerous working conditions because of their union activities.

WE WILL NOT threaten our employees with unspecified reprisals if they wear union insignia.

WE WILL NOT tell our employees that they can report to management that other employees are soliciting them to join

the Union, where the solicited employee has not complained of same.

WE WILL NOT discourage membership in the above-named Union, or any other labor organization, by discharging or reprimanding employees in retaliation for their union activities, or by discriminating against them in any other manner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer James Spivey and Stephen Ching reinstatement to their former positions, and make them whole, with interest, for any losses they may have suffered because of our unlawful discharges of them.

WE WILL rescind our warning issued to Randall Morgan, and our two warnings issued to James Spivey, on January 21, 1993.

WE WILL expunge from our records all references to the foregoing discharges and warnings, and advise each employee in writing that this has been done and that we will not rely on this discipline as a basis of any future discipline of them.

MEISNER ELECTRIC, INC. OF FLORIDA